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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ANTHONY AREVALO, Plaintiff and Appellant, v. CITIMORTGAGE, INC., Defendant and Respondent.	B261310 (Los Angeles County Super. Ct. No. MC024837)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carlos P. Baker, Jr. and Brian C. Yep, Judges. Affirmed.

Anthony Arevalo, in pro. per., for Plaintiff and Appellant.

Akerman LLP, Karen P. Ciccone and Parisa Jassim for Defendant and Respondent.

INTRODUCTION

Plaintiff Anthony Arevalo filed the instant lawsuit in an attempt to enjoin his mortgage lender, Citimortgage, Inc. (Citimortgage), from foreclosing on his home. Plaintiff, who represented himself below and does so in this appeal, styled his action as a request for injunctive relief. Generally speaking, the complaint appears to contest Citimortgage's authority to foreclose, as well as the authority of Mortgage Electronic Registrations Systems, Inc. (MERS) to effect transfers of the mortgage. The trial court sustained Citimortgage's demurrer without leave to amend and entered a judgment of dismissal. Finding no error, we affirm.

FACTS AND PROCEDURAL BACKGROUND

According to the complaint and judicially noticeable documents submitted by Citimortgage in support of its demurrer,[1] plaintiff obtained a mortgage loan from Fieldstone Mortgage Company (Fieldstone) in order to purchase a home in Palmdale.[2] On August 12, 2005, plaintiff executed a promissory

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[1] In support of its demurrer, Citimortgage filed a request for judicial notice of the recorded deed of trust, assignments of the deed of trust, the notice of default, and the notice of trustee's sale. The record does not reveal whether the court granted Citimortgage's request. However, these documents are the proper subject of judicial notice by this court under Evidence Code section 452, subdivisions (c) and (h), and section 459, subdivision (a). (See *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. 1.) Accordingly, we take notice of their existence and contents, though not of disputed or disputable facts stated therein. (*Ibid.*)

[2] Plaintiff purchased the home jointly with another party. The coborrower was not a party below and is not a party to the appeal.

note in favor of Fieldstone and a deed of trust naming MERS as nominee for Fieldstone and its successors and assigns.

Eventually, plaintiff fell behind on his mortgage payments. On February 20, 2014, Citimortgage, through its agent Clear Recon Corporation, recorded a notice of default stating plaintiff was in arrears on the mortgage in the amount of $32,597.33. The notice of trustee's sale, issued on May 28, 2014, set the date of sale for June 26, 2014. Plaintiff filed for bankruptcy on June 25, 2014, but the court dismissed the bankruptcy on August 6, 2014 due to plaintiff's failure to appear.

On September 2, 2014, plaintiff, representing himself, filed the complaint in the present action, seeking to enjoin the foreclosure sale. Although the complaint does not identify a legal basis for relief, the allegations appear to set forth four separate theories. Primarily, plaintiff challenges the validity of the mortgage assignment from the original lender, Fieldstone, to Citimortgage. First, plaintiff asserts the mortgage assignment from Fieldstone to Citimortgage is invalid because Fieldstone transferred all of its interest in the mortgage to another party prior to executing the assignment to Citimortgage. Second, plaintiff claims that the MERS agent who executed the assignment on behalf of Fieldstone had no authority to do so, because she worked for MERS, not Fieldstone. Third, plaintiff appears to contend that even though MERS is the nominee for Fieldstone on the deed of trust, MERS has no interest it could transfer to Citimortgage because MERS does not also own the promissory note. Finally, plaintiff claims the mortgage loan is unlawful and unenforceable because Fieldstone was not authorized to do business in California on August 12, 2005, when it first made the loan to plaintiff.

Citimortgage demurred to the complaint on several grounds: failure to join a necessary and indispensible party, failure to state a claim, and uncertainty. (Code Civ. Proc.,

§ 430.10, subds. (d),(e) & (f).) Citimortgage also asserted that the complaint was barred by judicial estoppel. The trial court sustained the demurrer without leave to amend, but provided no rationale for its decision.

Plaintiff appealed from the order sustaining the demurrer without leave to amend, which order is not appealable under Code of Civil Procedure section 904.1. However, the court subsequently entered a judgment of dismissal and we construe plaintiff's notice of appeal as a premature appeal from that judgment. (See Cal. Rules of Court, rule 8.104(d)(2); *Los Altos Golf & Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198, 202-203 [construing appeal from order sustaining demurrer as appeal from subsequently entered judgment of dismissal].)

CONTENTIONS

Plaintiff asserts the trial court erred by sustaining Citimortgage's demurrer without leave to amend.

DISCUSSION

A. Standard of Review

"When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Courts must also consider judicially noticed matters. (*Ibid.*) In addition, we give the complaint a reasonable interpretation, and read it in context. (*Ibid.*) If the trial court has sustained the demurer [*sic*], we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. (*Ibid.*) If we find that an

amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. (*Ibid.*) The plaintiff has the burden of proving that an amendment would cure the defect. (*Ibid.*)" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 81, disapproved on another point by *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939-941 (*Yvanova*).)

B. The complaint fails to state a valid claim for relief.

1. Background principles regarding nonjudicial foreclosure.

Initially, we note that "[t]he nonjudicial foreclosure system is designed to provide the lender-beneficiary with an inexpensive and efficient remedy against a defaulting borrower, while protecting the borrower from wrongful loss of the property and ensuring that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser. [Citation.]" (*Yvanova, supra*, 62 Cal.4th at p. 926.) As one court explained, "California's nonjudicial foreclosure scheme is set forth in Civil Code sections 2924 through 2924k, which 'provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust.' (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830 (*Moeller*).) 'These provisions cover every aspect of exercise of the power of sale contained in a deed of trust.' (*I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285.) . . . . 'Because of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute.' (*Lane v. Vitek Real Estate Industries Group* (E.D.Cal.2010) 713 F.Supp.2d 1092, 1098; see also *Moeller*, at p. 834 ['It would be inconsistent with the

comprehensive and exhaustive statutory scheme regulating nonjudicial foreclosures to incorporate another unrelated cure provision into statutory nonjudicial foreclosure proceedings.'].)" (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154.)

Bearing these principles in mind, we address each of plaintiff's theories in turn.

2. Plaintiff cannot challenge the validity of the assignment from Fieldstone to Citimortgage in a preforeclosure action.

Plaintiff contends the April 5, 2013 mortgage assignment from Fieldstone to Citimortgage is invalid because Fieldstone had no interest in the mortgage at that time. Specifically, plaintiff alleges that on January 9, 2007, after he executed the promissory note in favor of Fieldstone, Fieldstone transferred its entire interest in the promissory note to HSBC Mortgage Services, Inc. As a consequence, plaintiff asserts, Fieldstone also relinquished all right to enforce the deed of trust after January 9, 2007, and therefore Fieldstone had no interest in the note or the deed of trust on April 5, 2013, when it purported to transfer the mortgage to Citimortgage.

Although plaintiff does not explain the legal basis for his claim, we note that the 2013 Homeowner's Bill of Rights (HBOR), which is applicable here,[3] provides that "[n]o entity shall record or cause a notice of default to be recorded or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the

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[3] The HBOR applies where a notice of default is recorded after its effective date, January 1, 2013. (*Lucioni v. Bank of America, N.A.* (2016) 3 Cal.App.5th 150, 157.)

designated agent of the holder of the beneficial interest." (Civ. Code, § 2924, subd. (a)(6).)[4] We construe plaintiff's complaint to assert a violation of this section of the HBOR.

Our colleagues in Division Five recently had occasion to consider the availability of injunctive relief under the HBOR. As that court explained, "the Legislature authorized a private right of action to enjoin a nonjudicial trustee's sale where a lender violates any one of nine statutory provisions," most of which "place duties upon a lender before it may record a notice of default." (*Lucioni v. Bank of America, N.A.* (2016) 3 Cal.App.5th 150, 158 (*Lucioni*); § 2924.12, subd. (a)(1).) Importantly for our purposes, however, the "Legislature . . . did not provide for injunctive relief for a violation of section 2924(a)(6), the provision that the complaint relies upon in seeking injunctive relief." (*Ibid.*) Because " 'the expression of some things in a statute implies the exclusion of others not expressed,' " the court concluded that the Legislature, by specifically providing injunctive relief for violation of only a few provisions of the HBOR, did not intend to authorize injunctive relief for violation of the remaining provisions of the HBOR. (*Id.* at p. 159.) Accordingly, the court declined to construe the HBOR as impliedly authorizing injunctive relief for a violation of section 2924(a)(6).

We conclude, therefore, that plaintiff's first theory fails as a matter of law because "[u]nder the HBOR, . . . a plaintiff may not seek to enjoin a foreclosure based on a claim that the foreclosing party lacked the necessary authority to foreclose." (*Lucioni, supra*, 3 Cal.App.5th at pp. 159, 161 [noting the Legislature chose, as a matter of policy, to authorize injunctive relief only for particular violations of the HBOR].)

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[4] Further unspecified section references are to the Civil Code.

Further, our Supreme Court's recent decision in *Yvanova, supra,* 62 Cal.4th 919, is not controlling. There, the Court considered whether a homeowner asserting a claim of wrongful foreclosure had standing to challenge the validity of the assignment which purported to give the foreclosing lender an interest in the mortgage and, therefore, the right to foreclose. However, *Yvanova* arose in the context of a postforeclosure action, not, as here, in an action to enjoin a foreclosure. (*Id.* at p. 934.) Further, the Court emphasized that it did not have cause to consider the impact of the HBOR, because the notice of default in that case was recorded before the HBOR's effective date. (*Id.* at pp. 941-942.) Any extension of *Yvanova* into the preforeclosure setting would plainly be inconsistent with the Legislature's clearly expressed desire to limit judicial involvement in nonjudicial foreclosures.

3. Plaintiff's claims relating to MERS fail as a matter of law.

Two of plaintiff's theories relate to actions taken by MERS in connection with the assignment of the mortgage from Fieldstone to Citimortgage. To the extent these theories ultimately implicate Citimortgage's authority to foreclose, our conclusion in section B.2, *ante*, applies. Furthermore, and in any event, these theories fail as a matter of law because it is settled that MERS, as nominee for a mortgage lender, has the authority to exercise the legal rights of the lender—rights which include assigning the lender's interest in a mortgage.

The role MERS plays in the lending marketplace has been examined by our courts on several occasions. "MERS is a private corporation that administers a national registry of real estate debt interest transactions. Members of the MERS System assign limited interests in the real property to MERS, which is listed as a grantee in the official records of local governments, but the

members retain the promissory notes and mortgage servicing rights. The notes may thereafter be transferred among members without requiring recordation in the public records. [Citation.] [¶] Ordinarily, the owner of a promissory note secured by a deed of trust is designated as the beneficiary of the deed of trust. [Citation.] Under the MERS System, however, MERS is designated as the beneficiary in deeds of trust, acting as 'nominee' for the lender, and granted the authority to exercise legal rights of the lender." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 267 (*Fontenot*), disapproved on another point by *Yvanova, supra*, 62 Cal.4th at pp. 939-941.)

Plaintiff alleges that the 2013 mortgage assignment from Fieldstone to Citimortgage is invalid because the MERS agent who executed the assignment on behalf of Fieldstone had no authority to do so, as she worked for MERS, not Fieldstone. However, the deed of trust executed by plaintiff on August 12, 2005, states that "MERS is the beneficiary under this Security Instrument." The deed of trust further provides, "[t]he beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS." In short, consistent with the role MERS generally plays in the mortgage marketplace, Fieldstone authorized MERS to act on its behalf and exercise its legal rights. Thus, it was unnecessary for the agent who executed the assignment to be employed by Fieldstone, rather than MERS, as plaintiff suggests.

Plaintiff also alleges that MERS is not empowered to make any assignment of the mortgage because it does not own the promissory note as well as the deed of trust. Again, plaintiff's theory is fatally flawed.

"Ordinarily, the owner of a promissory note secured by a deed of trust is designated as the beneficiary of the deed of trust. [Citation.] Under the MERS System, however, MERS is

designated as the beneficiary in deeds of trust, acting as 'nominee' for the lender, and granted the authority to exercise legal rights of the lender." (*Fontenot, supra*, 198 Cal.App.4th at p. 267.) In *Fontenot*, as here, plaintiff contended MERS lacked the authority to foreclose on the property because, as the mere nominee of the lender, MERS had no interest in the promissory note. In affirming the judgment of dismissal, the court of appeal reasoned that, "[c]ontrary to plaintiff's claim, the lack of a possessory interest in the note did not necessarily prevent MERS from having the authority to assign the note. While it is true MERS had no power *in its own right* to assign the note, since it had no interest in the note to assign, MERS did not purport to act for its own interests in assigning the note. Rather, the assignment of deed of trust states that MERS was acting as nominee for the lender, which *did* possess an assignable interest." (*Id.* at p. 270.) In other words, "the allegation that MERS was merely a nominee is insufficient to demonstrate that MERS lacked authority to make a valid assignment of the note on behalf of the original lender." (*Id.* at p. 271, footnote omitted.) Accordingly, the plaintiff's theories related to MERS fail as a matter of law.

4. Fieldstone's corporate registration

Finally, the complaint alleges the mortgage loan is invalid and unenforceable because Fieldstone was not authorized to do business in California on August 12, 2005, when it first made the loan to plaintiff. Plaintiff has not provided any legal authority for this remarkable proposition, and we reject the argument on that basis. (See, e.g., Cal. Rules of Court, rule 8.204(a); *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 ["An appellate court is not required to examine undeveloped claims, nor to make arguments for parties"]; *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003-1004, fn. 2, [contentions waived

when there is a lack of reasoned argument and citation to authority]; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived"]; *Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511, 526, fn. 9 [passing reference to subject does not constitute legal argument].)

C. Plaintiff fails to demonstrate how an amendment could cure the complaint's defects.

In general, leave to amend an original complaint should be liberally granted. However, "[w]here there is a request for leave to amend but it is 'wholly insufficient to suggest whether or how the plaintiff could amend[ ] "the question as to whether or not [the trial] court abused its discretion" in denying leave to amend remains open on appeal. (Code Civ. Proc., § 472c.) But it is the *trial court's* discretion that is at issue; the reviewing court may only determine, as a matter of law, whether the trial court's discretion was abused. In our view an abuse of discretion could be found, absent an effective request for leave to amend in specified ways, only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case.' [Citation.]" (*Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1501 (*Herrera*), disapproved on another point by *Yvanova, supra*, 62 Cal.4th at pp. 939-941.) Accordingly, we will affirm an order sustaining a demurrer without leave to amend where the plaintiff does "not state in the trial court new facts demonstrating they could successfully amend the complaint and a potentially effective amendment is not apparent on appeal." (*Herrera, supra*, at p. 1501.)

Here, in opposition to Citimortgage's demurrer, plaintiff requested the opportunity to amend his complaint in the event the court decided to sustain the demurrer. However, plaintiff

made no attempt to explain how he could amend his complaint to state a viable cause of action.[5] On appeal, plaintiff does not raise the issue. As we see no reasonable possibility that an amendment could produce a viable cause of action, we conclude the court did not abuse its discretion by sustaining the demurrer without leave to amend.

DISPOSITION

The judgment of dismissal is affirmed. Citimortgage to recover its costs on appeal.

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LAVIN, J.

WE CONCUR:

ALDRICH, Acting P. J. STRATTON, J.*

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[5] Plaintiff did argue, in his reply brief, that he could amend the complaint to add the coborrower. Although that amendment would correct his failure to name an indispensible party to the action, it would not affect the viability of his legal claims against Citimortgage.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.